

Issues: Group II Written Notice (unsatisfactory performance and failure to follow instructions), and Termination due to accumulation; Hearing Date: 07/22/15; Decision Issued: 07/28/15; Agency: Virginia Tech; AHO: Carl Wilson Schmidt, Esq.; Case No. 10618; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10618

Hearing Date: July 22, 2015

Decision Issued: July 28, 2015

PROCEDURAL HISTORY

On April 15, 2015, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory work performance and failure to follow instructions. She was removed from employment based on the accumulation of disciplinary action.

On May 7, 2015, Grievant filed a grievance challenging the disciplinary action and alleging she was treated unfairly. The matter proceeded to hearing. On June 2, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 22, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Virginia Tech employed Grievant as a Development Associate.

Grievant had prior active disciplinary action. She received a Group I Written Notice on December 16, 2013 for unsatisfactory performance. On April 1, 2014, Grievant received a Group I Written Notice for attendance/excessive tardiness. On September 23, 2014, Grievant received a Group II Written Notice for unsatisfactory performance and failure to follow instructions and/or policy. On October 29, 2014, Grievant received a Group II Written Notice for unsatisfactory performance.

Grievant reported to the Supervisor. Part of her duties included completing tasks requested by other employees in the unit including Mr. M.

On March 15, 2015, the Supervisor counseled Grievant:

My directives to you with regard to these issues are to keep up with your assigned work, complete tasks that are assigned to you on schedule, communicate to me when assignments are not being completed, do not have disruptive personal conversations at work with your colleagues¹

¹ Agency Exhibit 6.

On March 24, 2015, Mr. M sent Grievant seven emails seeking assistance from Grievant. The emails asked Grievant:

Can you please run banner reports to see if these folks are [department] alums?

If they are, please run a 101 on them, print it and their [social media site] profile off, two sided and stapled for me as we have been doing with the current [social media site] research.

In addition, please verify their addresses and fill in the updated personal and business contact information as needed on the 101 and forward the updates to [email address.]

I ask that the data updates and printed documents be completed and provided to me by 5PM, this Friday March 27, 2015.²

Grievant did not complete the tasks by March 27, 2015. She did not inform the Supervisor that the assignment was not completed on time. On March 30, 2015, Mr. M contacted the Supervisor and complained that Grievant had not finished the tasks. The Supervisor spoke with Grievant on March 30, 2015 regarding the assignment. Grievant told him that she was not able to confirm the addresses but that she had “run” the social media website reports. The Supervisor asked Grievant why she had not spoken with Mr. M about the assignment. Grievant said she spoke with Mr. M. The Supervisor attempted to verify Grievant’s conversation with Mr. M and met with Mr. M on three separate occasions. The Supervisor asked Mr. M if Grievant had spoken with him about the assignment not being completed and Mr. M repeatedly said Grievant had not spoken with him about the assignment.

On March 31, 2015, the Supervisor sent Grievant an email stating

We were discussing letting [Mr. M] know the project would not be finished by the deadline. I asked you how you let [Mr. M] know because there were no emails and you said you followed up with him. My question is did you speak to [Mr. M] about this assignment?

Grievant replied:

I did not send [Mr. M] anything regarding the deadline. I remember asking [Mr. M] if he needed the new addresses before giving him the [social media website information] and the 101s because I had the part done. He stated he wanted the updated addresses before he got them back and I let

² Agency Exhibit 3.

him know I was sending out requests for the information but that it was difficult getting a response back.³

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”⁴ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

“[U]nsatisfactory work performance” is a Group I offense.⁵ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On March 24, 2015, Grievant was assigned responsibility to complete several research tasks by March 27, 2015. The assignment was within the scope of Grievant’s abilities. Grievant was given a reasonable time frame to complete the tasks. Grievant did not meet the deadline. She did not notify the Supervisor that she was having difficulty completing the task as he had instructed her on March 17, 2015. Grievant’s work performance was unsatisfactory to the Agency and consistent with a Group I offense. Grievant had a prior active group notice for unsatisfactory performance. An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Since Grievant has prior active disciplinary action for unsatisfactory work performance, the Agency may elevate the Group I offense to a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. With the disciplinary action issued in this case, Grievant has accumulated at least two Group II Written Notices thereby justifying the Agency’s decision to remove her from employment.

Grievant argued that she completed most of the work and presented it to the Supervisor as she was being removed from employment. The Agency contends Grievant did not complete the work or submit it to the Supervisor as she left. If the Hearing Officer assumes for the sake of argument that Grievant completed most of the

³ Agency Exhibit 3C.

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ See Attachment A, DHRM Policy 1.60.

assignment, her failure to complete the assignment within the deadline is unsatisfactory work performance. Her failure to notify the Supervisor she had not completed the assignment is failure to follow instructions. In either event, the Agency has presented sufficient evidence to support the issuance of disciplinary action. Given Grievant's prior active disciplinary action, any additional disciplinary action would justify the Agency's decision to remove Grievant from employment.

Grievant argued that the Supervisor singled her out for discipline because of her protected activity. She argued that the Agency discriminated against her because of her disability. No credible evidence was presented to support these allegations.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"⁶ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director

⁶ *Va. Code § 2.2-3005.*

Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁷

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.